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No. 159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

MANILA ELECTRIC COMPANY,
Petitioner,

versus

A. L. YATCO, COLLECTOR OF INTERNAL REVENUE OF THE PHILIPPINES,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

JAMES M. ROSS
Attorney for Petitioner,
414 National City Bank Bldg.
Manila, Philippines

McCullough Printing Co. 63332

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IN THE

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MANILA ELECTRIC COMPANY,
Petitioner,

VS.

A. L. YATCO, COLLECTOR OF INTERNAL REVENUE OF THE PHILIPPINES.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the Supreme Court, Commonwealth of the Philippines, in the case of Manila Electric Company *vs.* A. L. Yatco, Collector of Internal Revenue (G. R. No. 45697).

In support of this petition, Manila Electric Company respectfully shows to this Honorable Court:

A.
SUMMARY STATEMENT OF THE MATTER INVOLVED

I.

Petitioner is a Philippine corporation duly engaged in business in the Philippines. (R-8)

II.

During the year 1935, petitioner entered into contracts of insurance on real and personal property located in the Philippines with the City of New York Insurance Company and the United States Guaranty Insurance Company, both of which were non-resident foreign corporations which were not licensed to engage in business in the Philippines and which had no agent or representative in the Philippines. (R-9) This insurance was placed by petitioner in the City of New York, United States, without the use or services of any agent or other representative of the insurance companies residing or engaged in business in the Philippines. (R-10) The insurance contracts were made, the policies issued, and premiums in the amount of Ninety-One Thousand Six Hundred Ninety-Six Pesos and No Centavos, (₱91,696.00), Philippine currency, were paid to the insurance companies in New York. (R-9, 10)

III.

Losses were to be paid in New York City. (R-19-20) The policies contained the usual clauses providing that the insured, on making claim for loss, must submit satisfactory proof of loss to the insurance company and give the insurance company the right, on the happening of any loss, if it desired, to take possession of the property. The policies also provided that if arbitrators appointed by the parties to value the prop-

erty could not agree on an umpire, one should be appointed "by a judge of a court of record in the State in which the property insured is located". (R-21 et seq.)

IV.

Respondent, Collector of Internal Revenue, acting under the provisions of Section 192 of Act No. 2427, as amended by Section 1 of Act No. 2430, and Section 2 of Act No. 2648, and Section 4 of Act No. 3575 of the Philippine Legislature, assessed and levied against plaintiff a tax of one per cent (1%) on the amount of the premiums paid by petitioner on the said insurance policies, the premiums totaling Ninety-One Thousand Six Hundred Ninety-Six Pesos and No Centavos (₱91,696.00), Philippine currency, and the tax collected by the Collector of Internal Revenue thereon totaling Nine Hundred Sixteen Pesos and Ninety-Six Centavos (₱916.96). (R-3) Section 192 as aforesaid provides:

> "SEC. 192. It shall be unlawful for any person, company or corporation in the Philippine Islands either to procure, receive, or forward applications for insurance in or to issue or to deliver or accept policies of or for any company or companies not having been legally authorized to transact business in the Philippine Islands, as provided in this chapter; and any such person, company or corporation violating the provisions of this section shall be deemed guilty of a penal offense, and, upon conviction

thereof, shall for each such offence be punished by a fine of two hundred pesos, or imprisonment for two months, or both in the discretion of the court: *Provided*, That insurance in companies not authorized to transact business in the Philippine Islands may be placed upon terms and conditions as follows:

The Insurance Commissioner may issue a certificate of authority to any regularly authorized fire, marine or miscellaneous insurance agent of the Philippine Islands, subject to revocation at any time, permitting the person named therein to procure policies of such insurance as he may have previously been regularly authorized to transact on risks located in the Philippine Islands for companies not authorized to transact business in the Philippine Islands.

Before the agent named in such certificate of authority shall procure any insurance in such company there shall be executed and filed in each case with the insurance commissioner by the agent and by the party desiring the insurance affidavits setting forth that the party desiring insurance is, after diligent effort, unable to procure, in any of the companies authorized to to do business in the Philippine Islands, the amount of insurance necessary.

Every such agent shall keep a separate account of the business done under the author-

ity of this section, open at all times to the inspection of any authorized Government officer, showing the exact amount and character of such insurance placed for any person, firm or corporation, the gross premium charged thereon, the companies with which the same is placed, the dates of the policies, the terms thereof, and the location of the insured property.

Such agent shall likewise make a yearly report to the Collector of Internal Revenue at the time and in the manner prescribed in section eighty-one of Act Numbered Twenty-three hundred and thirty-nine, showing the entire amount of all premiums received by the company he represents under the authority of this section. And such agent shall pay to the Collector of Internal Revenue a tax equal to twice the tax imposed by section Seventy-nine of Act Numbered Twenty-three hundred and thirty-nine, which tax shall be paid at the same time and be subject to the same penalty for delinquency as the tax imposed by said Act Numbered Twenty-three hundred and thirty-nine: *Provided, however*, That the provisions of this section shall not apply to reinsurance; *And provided further*, That the prohibitions of this section shall not affect the right of an owner of property to apply for and obtain for himself policies in foreign companies in cases where said owner does not make use of the services of any agent, company or

corporation residing or doing business in the Philippine Islands. In all cases where owners of property obtain insurance directly with foreign companies, it shall be the duty of said owners to report to the insurance commissioner and to the Collector of Internal Revenue each case where insurance has been so effected, and shall pay the tax of one per centum on premium paid, in the manner required by law of insurance companies, and shall be subject to the same penalties for failure to do so.

Any decision made by the Insurance Commissioner by virtue of the powers conferred upon him by this Act shall be appealable to the Secretary of Finance (and Justice) whose decision shall be final."

V.

Petitioner paid the said taxes under proper protest and in due course brought action for their recovery (R-9, 10, 1-4). The trial court granted judgment for defendant, holding that the tax was properly imposed because of the fact that the insured property was located in the Philippines. The court also referred to certain clauses in the insurance contract providing for proof of loss satisfactory to the insurance company and providing that if arbitrators selected by the parties were unable to agree on an umpire, he should be selected by the judge of a court of record of the State where

the property was situated. The court did not find that either insurance company ever entered the Philippines or sent an agent here. (Decision, R-30).

VI.

The judgment was in due course appealed to the Supreme Court, petitioner assigning the following errors (R. 47-9):

1. The lower court erred in not holding that to the extent that section 192, as amended, of Act 2427, authorized appellee to levy a tax on appellant on premiums paid by the latter to the City of New York Insurance Company and United States Guaranty Insurance Company, such provision of law deprives appellant of liberty and property without due process of law and contravenes the provisions and limitations of the Act of Congress of August 29, 1916, and of the Constitution of the Philippines.

2. The lower court erred in holding that the City of New York Insurance Company and the United States Guaranty Insurance Company were doing business in the Philippines and were within the taxing jurisdiction of the Commonwealth of the Philippines.

3. The lower court erred in holding that the Supreme Court of the United States, in the case of Compañia General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 275 U. S. 85, 72 L. Ed. 177, did not declare that insofar as Section 192, as amended,

of Act 2427, allowed a tax to be assessed and levied upon premiums paid by an owner of property located in the Philippines on insurance procured outside of the Philippines from insurance companies not doing business in the Philippines, such section was in contravention of the provisions and limitations of the Act of Congress of August 29, 1916.

4. The lower court erred in denying plaintiff's motion for a new trial.

VII

On November 1, 1939, the Supreme Court affirmed the decision of the trial court and held the tax had been validly imposed. The court based its decision on the ground that (1) appellant, the insurer, was subject to Philippine jurisdiction; (2) the insured property was within the Philippines and subject to the protection of Philippine laws; and (3) the contract provided that certain incidents relative to adjustment of losses might be performed in the Philippines, though court did not find that the insurance companies had ever performed any acts in the Philippines or sent any agents here. (Decision, R-49-59.)

VIII

On November 16, 1939, petitioner filed a motion for reconsideration (R-59 et seq.) which was denied by the Supreme Court on December 20, 1939. (R-70) Final judgment was entered on December 23, 1940. R-70).)

REASONS FOR ALLOWANCE OF THE WRIT

Your petitioner urges the following reasons for the allowance of the writ herein prayed for:

I

This case involves determination of whether the provisions of Section 192 of the Philippine Insurance Law (Act No. 2427 as amended), insofar as they purport to impose a tax on the premiums paid by petitioner on insurance policies taken out in the United States, are contrary to the due process clause of the Constitution of the Philippines, Art. III, Sec. 1, Par. 1, which provides:

> "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

II

The decision of the Supreme Court of the Philippines decides this important point of Philippine constitutional law contrary to the decision of this Court in the case of Compañía General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 275 U. S. 87, 72 L. Ed. 177, 48 Sup. Ct. Rep. 100, wherein this Court held that Section 192, the same provision of the Philippine Insurance Law as that involved in the case, was contrary to the due process clause of the Jones Law (Sec. 3, Act of Congress of August 29, 1916) as

applied to a situation substantially identical with that before this Court in this case.

III.

The decision of the Supreme Court of the Philippines decides this important point of Philippine constitutional law contrary to the rules of law established by the decisions of this Court in the cases of Home Insurance Company et al *vs.* C. J. Dick, 281 U. S. 397-412, 50 Sup. Ct. 338, 74 L. Ed. 926; Allgeyer *vs.* State of Louisiana, 165 U. S. 78, 17 Sup. Ct. 427, 41 L. Ed. 832; Alaska Packers Association *vs.* Industrial Accounting Commission of the State of California, 294 U.S. 532-550, 48 Sup. Ct. 346, 79 L. Ed. 1044; St. Louis Cotton Compress Company *vs.* Arkansas, 260 U.S. 346, 67 L. Ed. 297, 43 Sup. Ct. 125 and by the decision of the Supreme Courts of the States of Idaho and Vermont in the cases of Hyatt *vs.* Blackwell Lumber Co., 31 Idaho 540; 173 Pac. 1083; 1 A.L.R. 1663 and Vermont *vs.* International Paper Co., 96 Vt. 506; 120 Atl. 900; 32 A.L.R. 632.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the Philippines, commanding that court to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case of Manila Electric Company *vs.* A. L. Yatco, Collector of Internal Revenue

in the Philippines, and that this said judgment of the Supreme Court of the Philippines may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seen just and proper.

MANILA ELECTRIC COMPANY

By

JAMES M. ROSS,

Counsel for Petitioner

BRIEF IN SUPPORT OF PETITION

I.

THE OPINIONS OF THE COURTS BELOW

The opinions of the Philippine Supreme Court (R-49-59) and of the Court of First Instance of the City of Manila (R-30-41) have not been officially reported.

II.

JURISDICTION

Jurisdiction of this Honorable Court is involved under the Act of Congress of February 13, 1925, Chapter 229, Sec. 7 (43 Stat. 940) which provides:

> "Sec. 7. That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, or wherein the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question, it shall be competent for the Supreme

> Court of the United States, upon the petition of a party aggrieved by the final judgment or decree, to require, by certiorari, that the cause be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought before it on writ of error or appeal; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review."

The Court's jurisdiction has been preserved by the Philippine Independence Act (Act of March 24, 1934, ch. 84, 48 Stat. 456, 48 U. S. C. A. Par. 1231 et seq.), which provides (in sub-division 6 of Par. 7 thereof, 48 Stat. 462, 48 U. S. C. A. Par. 1237) that:

> "Review by the Supreme Court of the United States of cases from the Philippine Islands shall be as now provided by law; and such review shall also extend to all cases involving the constitution of the Commonwealth of the Philippine Islands. (Jan. 17, 1933, c. 11, Par. 7, 47 Stat. 765; March 24, 1934, c. 84, Par. 7, 48 Stat. 460)"

The above provision of the Philippine Independence Act was incorporated in the Constitution of the Philippines as Sec. 1, Par. 13 of the Ordinance appended to the Constitution.

This case involves interpretation of Art. III,

Sec. 1, Par. 1, of the Constitution of the Philippines which provides:

> "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

The decision of the Philippine Supreme Court herein was rendered on November 1, 1939 (R-49-59). Final Judgment was entered on December 23, 1939, (R-70). Exception and Notice of Intention to apply for a Writ of Certiorari to the Supreme Court of the United States was filed on March 16, 1940. (R-71).

STATEMENT OF THE CASE

A full statement appears in the petition. In the interest of brevity, it is not repeated here.

SPECIFICATION OF ERRORS

The Supreme Court of the Philippines erred:

1. In holding that section 192 of Act No. 2427, as amended, insofar as it authorized respondent to levy a tax on premiums paid to the City of New York Insurance Co. and the United States Guaranty Insurance Co. in this case, did not contravene the provisions and limitations of section 3 of the Act of Congress of August 29, 1916, and of article III, section 1, paragraph 1 of the Constitution of the Philippines.

2. In holding that the Commonwealth of the Philippines had jurisdiction to impose a tax on insur-

ance premiums paid in the United States to non-resident insurance companies not engaged in business in the Philippines and not entering into contracts or having any agent or representative in the Philippines.

3. In not following the decision of the Supreme Court of the United States, in the case of Compañía General de Tabacos de Filipinas *v.* Collector of Internal Revenue, 275 U. S. 85, 72 L. Ed. 177.

ARGUMENT

Sec. 192 of the Philippine Insurance Law imposes a tax of 1% on premiums paid by insurers resident in the Philippines to insurance companies not engaged in business in the Philippines. In construing this section of Philippine law, this Court has said in the case of Compañía General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 72 L. Ed. 177, at p. 181:

> "Even though it (the tax imposed by Sec. 192 on premiums paid to foreign insurance companies) is only equal to the tax upon normal premiums paid in the Philippine Islands, it is imposed for the purpose of discouraging insurance in companies that do not pay tribute to the state because out of its taxing or penalizing jurisdiction * * *"

and on page 183:

> "We may properly assume that this tax placed upon the assured must ultimately be

paid by the insurer, and treating its real incidence as such, the question arises * * *"

The insurance contracts in this case were entered into entirely outside of the Philippines by petitioner and insurance companies not licensed to do business in the Philippines and not having any agent or representative in the Philippines. Premiums were paid in New York and losses would be paid there. The tax is thus clearly invalid within the principles laid down by this Court in the case of Allgeyer *vs.* State of Louisiana, 41 L. Ed. 832 and subsequently followed by it in St. Louis Cotton Compress Co. *vs.* Arkansas, 67 L. Ed. 297; Provident Savings Assoc. *vs.* Kentucky 60 L. Ed. 167; New York Life Insurance Co. *vs.* Head, 58 L. Ed. 1259; New York Life Insurance Co. *vs* Dodge, 62 L. Ed. 772; Compañía General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 72 L. Ed. 177; and by various state courts in the cases of Hyatt *vs.* Blackwell Lumber Co., 31 Idaho 540, 173 Pac. 1083, and Vermont *vs.* International Paper Co., 96 Vt. 506, 120 A. 900.

The Philippine Supreme Court upheld the tax, however, basing its decision upon the following grounds which petitioner will briefly consider:

(1) That petitioner, the insurer, was within Philippine jurisdiction.

This argument was answered by this Court in the Tabacalera case where it said:

> "The taxpayer, however, is resident in the Philippine Islands and within the governmental jurisdiction of those Islands. Its property in the Islands and its agents doing business there are within the reach of the government of the Islands. The Company may be compelled to pay what the government in its quasi sovereignty chooses to exact as a matter of power, unless restrained by law. A legal restriction upon the taxing power of the Philippine government over citizens and residents of the Islands is found in the liberty secured by the Organic Act which embraces the right to make contracts and accumulate property and do business outside of the Philippine Islands and beyond its jurisdiction without prohibition, regulation or governmental exaction."
>
> Compañia General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 72 L. Ed. 177, at p. 180.

If jurisdiction over the insured could legalize the tax, the decision of this Court and of the various state courts who have passed upon the point (see citations on p. 15) must be reversed, for in all of those cases, the insured was subject to the taxing jurisdiction.

(2) That the property insured was within the Philippines and was protected by Philippine law.

But the tax is not placed upon the property, for as this Court said in the Tabacalera case (L. Ed. p. 182) "The tax here is not upon the property insured. It is upon the contract or its proceeds. . . ."

Nor is the fact that the property was protected by Philippine Law a proper basis for imposition of a tax on insurance placed thereon outside of the state, for again as this Court said in the Tabacalera case:

> "It is true that in considering the question of the measure of the tax, this Court referred to the argument of the supreme court of Pennsylvania that the tax might be properly measured by New York contracts because Pennsylvania protected the individuals insured therein during their lives in Pennsylvania.... But such reference cannot be made a basis for an argument that such protection as the government of the Philippine Islands gave to the merchandise while being shipped at Manila furnished any jurisdiction for a tax by that Government on the premiums paid in Barcelona upon the insurance contract. If that were to be admitted, then neither the Allgeyer nor the St. Louis Cotton Compress Co. Case could be sustained, for the property in each of those cases was protected by the government seeking to impose the forbidden exactions upon the owner who obtained the insurance out of the state on that property within it."
>
> Compañia General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 72 L. Ed. 177 at p. 182.

It is true that in the principal case the property remained in the Philippines during the entire life of the insurance contract, while in the Tabacalera case, it was there only a portion of the time, but in determining jurisdiction or power to impose a tax, the length of time the property was within the state would appear immaterial. Also in the Hyatt *vs.* Blackwell Lumber Co., 31 Idaho 540, and Vermont *vs.* International Paper Co., 96 Vt. 506, cases, the property was permanently situated within the states seeking to impose the taxes and yet the respective state supreme courts held the taxes invalid.

(3) That the insurance contracts contained provisions by virtue of which the foreign insurance companies had the right to send agents into the Philippines in connection with the adjustment of losses.

The insurance contracts contained the usual clauses relating to proof of loss and authorizing the insurance company to take possession of the insured property in event of claim of loss. They also provided that in event the parties arbitrated the question of the valuation of the property or claim of loss and the arbitrators were unable to select an umpire, the umpire should be selected by "a judge of a court of record in the state in which the property insured is located".

The Philippine Supreme Court in its decision stated that, because the parties had agreed between themselves that the insurer might enter the Philippines

under the above conditions, the insurer was doing business in the Philippines. The court in its decision said:

> "The New York Insurance Company and the United States Guaranty Company may be said to be doing business in the Philippines because the insurance policies issued by them cover risks on properties within the Philippines which may require adjustment and the activities of agents in the Philippines with respect to the settlement of losses arising thereunder."

The court cited Equitable Life Assurance Society *vs.* Pennsylvania, 238 U. S. 143; 59 L. Ed. 1239, 23 Sup. Ct. 829, and the second part of the decision of Compañia General de Tabacos de Filipinas *vs.* Collector of Internal Revenue, 275 U. S. 87, 72 L. Ed. 177, in support of its statement. But neither of these cases is in point. In the Equitable case, the insurance company was actually engaged in business in Pennsylvania. As this court said (L. Ed. p. 182) "the tax was a tax on a privilege actually used, the only question concerned the mode of measuring the tax." The insurance company had actually sent agents and adjusters into the state and had paid dividends there. The London Insurance Company, in the second part of the Tabacalera case, was actually licensed to do business in the Philippines and this Court presumed the com-

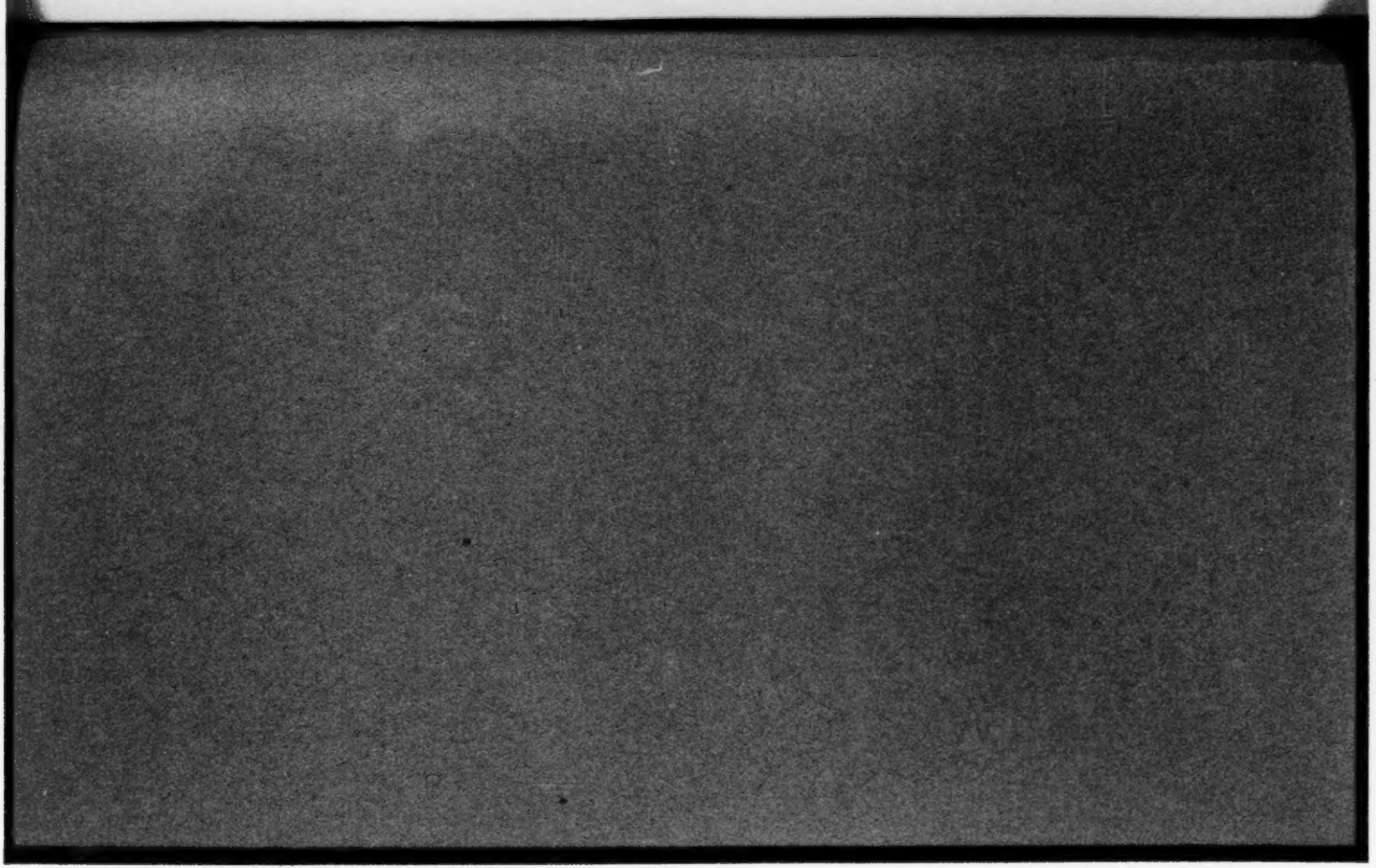
pany would avail itself of its license in carrying out its contract obligations.

But in the case here before this Court, the insurance companies are not licensed to engage in business in the Philippines and they have not sent any agents or representatives into the Philippines. At most, there is a possibility that they will do so, and petitioner submits such a mere possibility does not constitute engaging in business in the Philippines or subject non-resident foreign insurance companies to Philippine taxes.

Manila, Philippines, May 15, 1940.

Respectfully submitted,

JAMES M. ROSS
Attorney for Petitioner
414 National City Bank Bldg.,
Manila, Philippines



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 159

MANILA ELECTRIC COMPANY,
Petitioner,

vs.

A. L. YATCO, COLLECTOR OF INTERNAL REVENUE,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below.

The opinion (decision) of the Court of First Instance of Manila appears in full in the transcript of record (R. 30-41). The opinion (decision) of the Supreme Court of the Commonwealth of the Philippines, affirming the judgment of the trial court, also appears in full in the transcript of record (R. 49-59). Motion for reconsideration (R. 60-69) submitted by counsel for the petitioner (plaintiff below) was denied by the Supreme Court of the Philippines without opinion (R. 70).

Jurisdiction.

Final judgment was entered by the Supreme Court of the Philippines on December 23, 1939 (R. 70-71). Petition for writ of certiorari was filed June 17, 1940, together with a supporting brief and transcript of record. Petitioner seeks to invoke the jurisdiction of this Court

under section 7 of the act of February 13, 1925 (43 Stat. 936, 940, 28 U. S. C., sec. 349), and under section 7(6) of the Philippine Independence Law (act of March 24, 1934, 48 Stat. 456, 460, 462, 48 U. S. C., sec. 1237(6)), as supplemented by section 1(13) of the Ordinance appended to the Constitution of the Commonwealth of the Philippines.

Statutes Involved.

The pertinent provisions of the applicable statutes are set forth in the Appendix, p. 9.

Question Involved.

Whether the petitioner presents a sufficient basis for review by certiorari in contending that the decision of the Supreme Court of the Philippines, sustaining the validity of a tax imposed by the Commonwealth of the Philippines upon premiums paid by the petitioner on insurance policies placed with the City of New York Insurance Company and the United States Guaranty Insurance Company, foreign corporations, pursuant to section 192 of the Philippine Insurance Law, *infra,* is violative of the due process clause contained in Article III, Section 1(1) of the Philippine Constitution under decisions of this Court.

Statement.

Petitioner, a Philippine corporation engaged in business in the Philippines, seeks to recover 916.96 pesos paid under protest for taxes levied and assessed on premiums paid by the petitioner on certain insurance policies covering real and personal properties situated in the Philippines. The tax was assessed under section 192 of the Philippine Insurance Law (section 192 of Act No. 2427 (10 P. I. Public Laws 37), as amended by section 1 of Act No. 2430 (10 P. I. Public Laws 43), section

2 of Act No. 2648 (11 P. I. Public Laws 312), and section 4 of Act No. 3575 (25 P. I. Public Laws 33)), which provides for the payment of a tax of 1 percent of premiums paid for insurance obtained by owners of property directly with foreign companies.

The insurance contracts were entered into by the petitioner in New York City with the City of New York Insurance Company and the United States Guaranty Insurance Company, foreign corporations not licensed to do business in the Philippines. The contracts contain provisions which contemplate activities within the Philippines in connection with the ascertainment and adjustment of losses. The premiums on the insurance policies were paid in New York City.

Argument.

I

The sole issue in this case is whether the imposition of a tax based upon premiums paid by the petitioner on insurance policies placed with the City of New York Insurance Company and the United States Guaranty Insurance Company, foreign corporations, pursuant to the provisions of section 192 of the Philippine Insurance Law, *supra*, is a valid exercise of the taxing power of the Commonwealth.

In urging that the petition for a writ of certiorari should be granted, the petitioner contends that the decision of the Supreme Court of the Philippines is contrary to the decisions of this Court, particularly the decision in the case of *Compania General de Tabacos de Filipinas* v. *Collector of Internal Revenue*, 275 U. S. 87, in which the validity of taxes, assessed under the same provision of the Philippine Insurance Law as is here involved, was considered. It is submitted, however, that the decision of the Philippine Supreme Court not only is not in conflict with, but is supported by, the *Compania General* case.

In that case, this Court held that the Compania General, a Spanish corporation doing business in the Philippines, with its head office in Barcelona, Spain, could not be required to pay a tax of 1 percent of premiums paid pursuant to a contract of insurance covering marine risks on merchandise shipped from the Philippine Islands to Barcelona, inasmuch as the contract was entered into in Paris with a French corporation not licensed to do business in the Philippines and made provision for the payment of premiums and losses in Paris. But the Court also held in the same case that the tax was properly levied and collected with respect to premiums paid by the Compania General pursuant to a contract of insurance entered into in London with an English corporation, licensed to do business in the Philippines, and providing for the payment of premiums and losses in London, where it appeared that the policy covered risks on property within the Philippines which might require adjustment, and the activities of agents in the Philippine Islands in connection with the settlement of losses.

In the instant case, the Philippine Supreme Court held that the facts warranted the application of that part of the *Compania General* case which had reference to the tax upon premiums paid to the London company, and not that part which considered the tax upon premiums paid to the Paris company. Like the insurance contract with the London company, the petitioner's contracts with the New York insurers expressly contemplate that adjustment of losses and various related activities of the insurers should take place within the Philippines. The contracts provide that the "insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company" (R. pp. 27, 28); that, in case of disagreement "as to the amount of loss or damage, each shall * * * select a competent and disinterested

appraiser" (R. p. 28); that the "appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the State in which the property insured is located" (R. p. 28); that the insurer shall have the option "to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time * * *" (R. p. 29).

It is urged by the petitioner that the performance by the insurers of such activities in connection with the adjustment of losses is a mere possibility and is, therefore, not a proper basis for holding that the insurers subjected themselves to the jurisdiction of the Commonwealth. But in the *Compania General* case (*supra*, p. 98) this Court said that "the policy covers fire risks on property within the Philippine Islands which *may* require adjustment, and the activities of agents in the Philippine Islands with respect to settlement of losses arising thereunder." (Emphasis added.) And similarly, in the case of *Equitable Life Assurance Society* v. *Pennsylvania*, 238 U. S. 143, on the authority of which the portion of the *Compania General* case dealing with the London company contract was decided, the Court said (p. 147):

> "It is obvious that many incidents of the contract are *likely* to be attended to in Pennsylvania, such as payment of dividends when received in cash, sending an adjuster into the State in case of dispute, or making proof of death." (Emphasis added.)

It is abundantly clear, therefore, that the existence in the contract of provisions contemplating activity in the Philippines, is all that is required.

The petitioner seeks to distinguish the *Compania General* case on the ground that whereas the London company was actually licensed to do business in the Philippines, in the instant case "the insurance companies are not licensed

to engage in business in the Philippines and * * * have not sent any agents or representatives into the Philippines" (Petition, pp. 19, 20). A similar argument is also made by the petitioner with reference to the applicability of the *Equitable Society* case. Upon analysis of the second part of the *Compania General* case, however, it will be seen that the rationale and crux of the decision are that certain incidents of the contract were likely to be or might have been performed by the London company within the Philippines and not that the insurer was licensed to do business there. And the significant difference between the second part of the *Compania General* case and the first part of that case is not that the London company was licensed to do business in the Philippines whereas the Paris company was not, but that the contract with the London company covered fire risks on property within the Philippines which might have required certain adjustment activities there, whereas the contract with the Paris company insured the merchandise against maritime risks while en route from the Philippines to Europe and presumably would not have required such activities within the Philippines. That this is the correct interpretation of that decision is plainly indicated by the fact that the mere privilege or license to do business within a State does not subject a foreign corporation to a tax upon activities or transactions wholly performed and carried out without the State. *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77. Moreover, the foreign insurance companies in the instant case would be required to procure a license to do business within the Philippines in order to perform within that jurisdiction the contemplated activities in the course of the adjustment of losses (section 172 of the Philippine Insurance Law, Act No. 2427 (10 P. I. Public Laws 29); *Pennsylvania Lumbermen's Insurance Co.* v. *Meyer*, 197 U. S. 407; *Bothwell* v. *Buckbee Mears Co.*, 275 U. S. 274); and there would seem to be no valid distinction between the situation in the

Compania General case where the London company was licensed to do business in the Philippines at the time of the making of the insurance contract and the situation in the instant case where the foreign insurance companies would be required to qualify to do business in the Philippines as a condition to their right to perform the adjustment activities contemplated in their insurance policies.

The *Compania General* case and this case are, therefore, identical in their essential facts. This case presents no problem not considered by this Court in the former case and no solution not prescribed by this Court in the former case.

The petitioner also relies on the cases of *Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Provident Savings Ass'n* v. *Kentucky,* 239 U. S. 103; *New York Life Insurance Co.* v. *Head,* 234 U. S. 149; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357. All of these cases are clearly distinguishable and have no application here since in none of them does it appear that the contracts of insurance there involved required or contemplated the performance of any activities thereunder within the State seeking to exercise jurisdiction. Also all of these cases predate the *Compania General* case.

II

The tax under review in this case is one assessed directly against the insured.[1] It is submitted, therefore, that, quite apart from the question of whether the foreign insurers in the instant case may be said to contemplate doing business within the Philippines and thus to subject themselves to its taxing jurisdiction, the tax is

[1]A tax directly against insurance companies doing business in the Philippines is imposed under section 79 of Act No. 2339 (9 P. I. Public Laws 296, Appendix p. 10).

sustainable as one imposed upon the insured on the basis of premiums paid on a contract within the jurisdiction of the Commonwealth by reason of the fact that the insured and the property and risks covered are within the Philippines and certain activities in connection with the adjustment of losses are, under the contract, likely to be performed within the Philippines.

Conclusion.

For the foregoing reasons the respondent submits that the conclusion reached by the Supreme Court of the Philippines is correct and that, since the correctness of that conclusion is the only basis on which the petition is founded, the petition should be denied.

Respectfully submitted,

NATHAN R. MARGOLD,
Solicitor for the
Department of the Interior,
Washington, D. C.

FREDERIC L. KIRGIS,
First Assistant Solicitor,
Department of the Interior,
Washington, D. C.
Attorneys for Respondent.

ROMAN OZAETA,
Solicitor General of the Philippines,
Manila, P. I.

BERNARD C. KAMERMAN,
Assistant Solicitor,
Department of the Interior,
Washington, D. C.

JOHN B. JAGO,
Assistant Solicitor,
Department of the Interior,
Washington, D. C.
Of Counsel.

July 27, 1940.

APPENDIX

Section 7 of the act of February 13, 1925 (43 Stat. 936, 940, 28 U. S. C., sec. 349) provides:

"That in any case in the Supreme Court of the Philippine Islands wherein the Constitution, or any statute or treaty of the United States is involved, or wherein the value in controversy exceeds $25,000, or wherein the title or possession of real estate exceeding in value the sum of $25,000 is involved or brought in question, it shall be competent for the Supreme Court of the United States, upon the petition of a party aggrieved by the final judgment or decree, to require, by certiorari, that the cause certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought before it on [writ of error or][1] appeal; and, except as provided in this section, the judgments and decrees of the Supreme Court of the Philippine Islands shall not be subject to appellate review."

Section 7(6) of the act of March 24, 1934 (48 Stat. 456, 462, 48 U. S. C., sec. 1237(6)), provides:

"Review by the Supreme Court of the United States of cases from the Philippine Islands shall be as now provided by law; and such review shall also extend to all cases involving the constitution of the Commonwealth of the Philippine Islands."

Art. III, Section 1(1) of the Constitution of the Commonwealth of the Philippines, provides:

"No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

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[1] These words are obsolete because of the provisions of act of January 31, 1928, section 1 (45 Stat. 54, 28 U. S. C., sec. 861a) abolishing writs of error.

sustainable as one imposed upon the insured on the basis of premiums paid on a contract within the jurisdiction of the Commonwealth by reason of the fact that the insured and the property and risks covered are within the Philippines and certain activities in connection with the adjustment of losses are, under the contract, likely to be performed within the Philippines.

Conclusion.

For the foregoing reasons the respondent submits that the conclusion reached by the Supreme Court of the Philippines is correct and that, since the correctness of that conclusion is the only basis on which the petition is founded, the petition should be denied.

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Nathan R. Margold,
Solicitor for the
Department of the Interior,
Washington, D. C.

Fahnestock L. Kneen,
First Assistant Solicitor,
Department of the Interior,
Washington, D. C.
Attorneys for Respondent.

Roman Ozaeta,
Solicitor General of the Philippines,
Manila, P. I.

Bernard C. Kanrostis,
Assistant Solicitor,
Department of the Interior,
Washington, D. C.

John B. Jago,
Assistant Solicitor,
Department of the Interior,
Washington, D. C.
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Section 1(13) of the Ordinance appended to the Constitution of the Commonwealth of the Philippines provides:

> "The decisions of the courts of the Philippines shall be subject to review by the Supreme Court of the United States as now provided by law, and such review shall also extend to all cases involving the Constitution of the Philippines."

Section 79 of Act No. 2339 of the Philippine Legislature (9 P. I. Public Laws 296) provides:

> "*Tax on insurance premiums.*—There shall be collected from every person, company, or corporation (except purely cooperative companies or associations) doing insurance business of any sort in the Philippine Islands a tax of one per cent of the total premiums collected during each calendar year, whether paid in money, notes, credits, or any substitute for money, but premiums refunded within six months after payment on account of rejection of risk or returned for other reason to persons insured shall not be included in the taxable receipts; nor shall any tax be paid upon reinsurance by a company that has already paid the tax."

• • • • • •

Section 172 of Act No. 2427 of the Philippine Legislature (10 P. I. Public Laws 29), provides:

> "After the becoming effective of this Act, no foreign or domestic insurance company shall transact any new business in the Philippine Islands until after it shall have obtained a certificate of authority for that purpose from the Insurance Commissioner. No such certificate of authority shall be granted to any such company until the Insurance Commissioner shall have satisfied himself by such examination as he may make and such evidence as he may require that such company is qualified by the laws of the Philippine Islands to transact business herein. Said

certificate of authority shall expire on the last day of June of each year and shall be renewed annually if the company is continuing to comply with all of the provisions of this chapter. Before issuing such certificate of authority, the Insurance Commissioner must be satisfied that the name of the company is not that of any other known company transacting a similar business, or a name so similar as to be calculated to mislead the public. Every company receiving any such certificate of authority shall be subject to the insurance laws of the Philippine Islands and to the jurisdiction and supervision of the Insurance Commissioner. An appeal may be taken from any decision of the Insurance Commissioner, refusing to grant such certificate of authority to the Secretary of Finance and Justice whose decision shall be final."

Section 192 of Act No. 2427 of the Philippine Legislature (10 P. I. Public Laws 37), as amended by section 1 of Act No. 2430 (10 P. I. Public Laws 43), section 2 of Act No. 2648 (11 P. I. Public Laws 312), and section 4 of Act No. 3575 (25 P. I. Public Laws 33), provides:

"It shall be unlawful for any person, company, or corporation in the Philippine Islands either to procure, receive, or forward applications for insurance in or to issue or to deliver or accept policies of or for any company or companies not having been legally authorized to transact business in the Philippine Islands, as provided in this chapter; and any such person, company, or corporation violating the provisions of this section shall be deemed guilty of a penal offense, and, upon conviction thereof, shall for each such offense, be punished by a fine of two hundred pesos, or imprisonment for two months, or both in the discretion of the court: *Provided,* That insurance in companies not authorized to transact business in the Philippine Islands may be placed upon terms and conditions as follows:

* * * * * *

"* * * *And provided further,* That the prohibitions of this section shall not affect the right of an owner of

property to apply for and obtain for himself policies in foreign companies in cases where said owner does not make use of the services of any agent, company, or corporation residing or doing business in the Philippine Islands. In all cases where owners of property obtain insurance directly with foreign companies, it shall be the duty of said owners to report to the Insurance Commissioner and to the Collector of Internal Revenue each case where insurance has been so effected, and shall pay the tax of one per centum on premiums paid, in the manner required by law of insurance companies, and shall be subject to the same penalties for failure to do so. * * *"